Supreme Court, U.S.
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No. 95-1313

In The

Supreme Court of the United States

October Term, 1995

CAFE 207, INC., A Florida Corporation,

Petitioner,

vs.

ST. JOHNS COUNTY, a political subdivision of the State of Florida,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT ST. JOHNS COUNTY'S BRIEF IN OPPOSITION

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54 pp

ADDITIONAL QUESTIONS PRESENTED

1. Whether the Petitioner lacks standing to assert that the Respondent's ordinance is unconstitutionally vague or overbroad.

2. In the event the Court grants the petition for writ of certiorari and eventually rules the Ordinance unconstitutional, whether the decision should be limited to a prospective application.

3. Whether the appeal has become moot and the Court no longer has jurisdiction because the Petitioner no longer owns the restaurant (Cafe Erotica) that is affected by the ordinance.

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STATEMENT OF THE CASE

Statement Of The Facts

Prior to the passage of St. Johns County Ordinance 92-12 (hereinafter "the Ordinance"), the Petitioner Cafe 207, Inc. owned and operated a restaurant in St. Johns County (the "Cafe Erotica") that advertised and provided nude female waitresses and nude female dancers "who moved about in rhythmic fashion in time to music" (R3-58-1). On April 21, 1992 after three public hearings during which the County Commission received evidence, including court opinions, and heard testimony describing adverse secondary effects caused by public nudity, the County passed the Ordinance (P.A.-C). Prior to the hearings, the Petitioner published full page newspaper advertisements advising against passage of the Ordinance and postulating that "the citizens of St. Johns County would prefer to avoid paying hundreds of thousands of dollars in legal fees and damages for passage of an unconstitutional law" (R1-1-14 through 31). The Petitioner's advertisements made it inevitable that Petitioner's name would be mentioned by the public and by County Commissioners during the public hearings preceding passage of the Ordinance. There is nothing sinister about the mention of Petitioner's name. In fact, Commissioner Floyd's comments quoted at page 2 of Petitioner's brief clearly express the County Commission's desire to follow due process when combating adverse secondary effects caused by public nudity. The County's intent to combat the adverse secondary effects of public nudity and still protect First Amendment rights is also clearly set forth in Ordinance "Whereas" paragraphs (h), (k), (m), (n), (o), (u), (w), (x) and (y) (P.A.-C-26 through 29). For convenience, paragraphs (k), (m), (u), (w), (x) and (y) are set forth below. (Words that are capitalized in the text of the Ordinance are words that are defined in the Ordinance.)

> k) WHEREAS, the Board finds and determines that the mere appearance of Persons in the

Nude in Public Places generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, and encourages degradation of women and other activities which break down family structures; and,

m) WHEREAS, the Board's sole intent in enacting this ordinance is to prohibit the conduct of being Nude in Public Places and to suppress the adverse secondary effects such nudity generates, the Board nevertheless recognizes that there may be instances wherein appearing Nude in a Public Place may be expressive conduct incidental to and a necessary part of the freedom of expression that is protected by United States or Florida constitutional provisions; and,

u) WHEREAS, the Board finds and determines that the prohibitions contained herein are the most reasonable and minimal restrictions required so as to regulate conduct which is adverse to public order, health, morality, and decency within St. Johns County when such conduct takes place at locations where the public is present or is likely to be present, or where such conduct would be readily visible to the public; and,

w) WHEREAS, the Board is aware that States may regulate the conduct of appearing Nude in Public Places, see *Michael Barnes v. Glen Theatre, Inc.* 115 L.Ed.2d 504, 111 S. Ct. 2456 (1991); and,

x) WHEREAS, the Board is not hereby prohibiting nudity in truly private places or prohibiting nudity which is protected by United States or Florida constitutional provisions; and,

y) WHEREAS, the Board finds and determines that the express exemption contained in Section 7(b)(ii) of this ordinance provides adequate protection to Persons who, without such express

exemption, might otherwise be prevented or discouraged by the ordinance from exercising constitutionally protected rights;

Section 6 of the Ordinance then prohibits nudity on and in all public places within the unincorporated areas of St. Johns County. Such public places are defined in section 3(i) of the Ordinance to include streets, sidewalks, parks, beaches, businesses and other for profit and not for profit establishments. Section 7(a) of the Ordinance provides exemptions which allow full public nudity in places such as single sex public shower and locker rooms. Section 7(b) then allows full public nudity in other public places when such nudity constitutes public expression that is protected by the United States Constitution.

Petitioner alleged in its Petition for injunctive and other relief filed with the District Court that it operates the Cafe Erotica restaurant in St. Johns County and is the entity beneficially interested in the relief sought in the petition (R1-1-1,2). On or prior to March 1, 1996 the Petitioner conveyed the subject restaurant to another corporation (Respondent's Appendix). The Petitioner no longer owns or operates property within St. Johns County and has ceased to be affected by the Ordinance.

The Relevant Ordinance Provisions

A. The Prohibitory Provisions.

Petitioner contends at page 4 of its Petition that Ordinance Sections 3(h) and 3(i) require the Court to conclude that "nudity was specifically and expressly intended to be prohibited where engaged in by a performer before a paying audience." That is not true. Section 3(h) defines the term "places provided or set apart for nudity" to mean such places as single sex functional shower, locker and/or dressing room facilities, doctor's offices and similar places in which nudity or exposure is necessarily and customarily expected outside of the home. Section 3(h) also makes it clear that such terms shall not be deemed to

include places where a person's conduct of being nude is used for his or her profit. That provision clearly excludes brothels and other public establishments in which people are paid to remove their clothes and simulate or engage in sexual intercourse, masturbation and other forms of sexual behavior. It is indeed a stretch to use section 3(h) and 7(a) to conclude that the Ordinance targets nude expression that is protected by the First Amendment. The Ordinance "Whereas" paragraphs (m), (n), (u), (w), (x), and (y) and the Section 7 exemptions clearly provide the public, law enforcement personnel and the courts with notice that constitutionally protected nude expression is not prohibited by the Ordinance.

B. The Exemptions.

As stated in Ordinance "Whereas" paragraph (m), the County recognized that certain forms of expressive live nudity are protected by the United States Constitution. The exemptions provided in Section 7(b) of the Ordinance are the County's efforts to recognize and implement the protection afforded to true First Amendment nude expression. Section 7(b) recognizes that the imagination of humankind is capable of conceiving an exhaustive number of ways and variations whereby the conduct of being nude may be protected by the First Amendment. It is not required that the County provide an exhaustive list of such ways. See *McGuire v. State*, 489 So.2d 729, 732 (Fla. 1986). In fact, the Indiana statute as described in *Barnes* did not have any express exemption or safe harbor clause for First Amendment activities. The references to *Board of County Commissioners v. Dexterhouse*, 348 So.2d 916 (Fla. 2nd DCA 1977) and the United States Constitution in the section 7(b) exemption and the reference to *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991) in Ordinance "Whereas" paragraph (w) alert the County's sheriff deputies, the local prosecutors and the general public, including operators of public establishments such as the Kitty Kat Lounge and the Glen

Theatre Bookstore (the establishments described in *Barnes*) and producers of theatrical productions such as Hair and Ballet Africans, that First Amendment rights must be respected, but that nude conduct of the type described and prohibited in *Dexterhouse* and *Barnes* will not be permitted. The Ordinance clearly recognizes on its face that there are circumstances where public nudity is constitutionally protected and informs the public and law enforcement that the Ordinance does not prohibit nudity in those circumstances.

Other than the fact that the Ordinance contains findings and determinations of the County Commission, requires adult men and women to wear slightly more clothing below the waist than the g-strings referred to in *Barnes* (see the District Court's opinion, *Cafe 207 Inc., v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994) at 645, 646), contains an exemption for constitutionally protected nude expression, and has a severability provision, the Ordinance is substantively the same as the Indiana statute in *Barnes*.

C. Statements Of Purpose.

Petitioner advises the Court at page 6 of its brief that the Ordinance "Whereas" clauses "make clear that the ordinance was adopted with commercial nude dancing as its primary target." That contention is erroneous. The "Whereas" paragraph (n) cited by Petitioner in support of its argument states:

> n) WHEREAS, a requirement that dancers don opaque covering sufficient to cover the Buttocks and the Breasts as such portions of the human anatomy are defined in this ordinance does not deprive the dance of whatever erotic message, if any, it may convey, but simply makes such message, if any, slightly less graphic and imposes only an incidental limitation on the message.

This determination is simply the County Commission's response to the Petitioner's full page newspaper advertisements attacking the legality of the Ordinance. It expresses the County Commission's findings on a matter raised by Petitioner's advertisements and the Commission's concurrence with Chief Justice Rehnquist's determination (joined by Justices O'Connor and Kennedy) of similar substance in *Barnes* at 111 S. Ct. 2463.

Ordinance "Whereas" paragraph (r), also relied upon by the Petitioner states:

> r) WHEREAS, the Board finds and determines that the average person applying contemporary St. Johns County community standards would find that the public nudity prohibited by this ordinance, if allowed, when taken as a whole (i) appeals to the prurient interests and (ii) lacks serious literary, artistic, political, and scientific value.

This finding is clearly applicable to the public nudity described in paragraph A above and to other forms of public nudity not associated with commercial nude dance.

Impact of the Ordinance

Petitioner stipulated in the pre-trial statement filed with the District Court that "in response to the Ordinance the [Petitioner's] dancers now wear clothing which complies with the minimum requirements of the Ordinance" (R3-58-14).

The District Court Proceedings

Respondent disagrees with Petitioner's statements concerning discovery, evidence and the record available to the District Court. The Petitioner initiated the subject lawsuit on April 22, 1992. On May 5, 1992, after a hearing, the District Court entered a detailed order that denied Petitioner's request for a preliminary injunction and

directed Petitioner to file a memorandum within twenty days enumerating the remaining factual and legal issues, if any, that remained to be decided (R1-9). Petitioner did not file the memorandum and on June 11, 1992 the Court entered its order directing the Petitioner to show cause why the case should not be dismissed for lack of prosecution (R1-14-1). On July 23, 1992 the District Court entered its order directing administrative closure of the case file because the Petitioner advised the court that it did not intend to further prosecute the case pending the Petitioner's interlocutory appeal (R1-18-1). On August 4, 1993, after the Eleventh Circuit Court of Appeals denied Petitioner's appeal, the District Court entered an order reopening the case file (R1-25). On August 16, 1993 the County filed its motion for summary judgment (R1-26). On August 31, 1993 the District Court entered a scheduling order setting discovery cutoff on March 31, 1994 and scheduling the trial for May 1994 (R3-30). On September 28, 1993 the Petitioner filed a motion for summary judgment (R3-31). On December 9, 1993 the District Court entered its order granting Petitioner 60 days to file any additional evidentiary submission for court consideration in opposition to the County's motion for summary judgment or in support of its own motion for summary judgment and set Petitioner's filing deadline for February 7, 1994 (R3-43). On February 10, 1994 an order was entered granting Petitioner's motion to extend time for discovery through April 28, 1994. Petitioner had over 2 years from the time it instituted this lawsuit in April 1992 to pursue and complete discovery. On June 23, 1994 the District Court entered the subject memorandum opinion and summary judgment.

Contrary to the Petitioner's assertion, the District Court did not rule that the possible presence of controverting evidence on the secondary effects issue was irrelevant as a matter of law. The record before the District

Court clearly showed that the Petitioner and/or its attorney had attended the three public hearings prior to passage of the Ordinance but had presented no testimony or evidence to the County Commission to create an issue of fact pertaining to off-site adverse secondary effects (such as prostitution and sexual assaults) caused by public nudity. The District Court cited *Barnes* and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and affirmed that the County could "rely as St. Johns County did here, upon studies conducted by other similar bodies in determining the secondary effects of adult theaters." *Cafe 207* at 645.

REASONS THE PETITION SHOULD BE DENIED

Rule 10, Rules of the Supreme Court provides that a petition for writ of certiorari will be granted only for compelling reasons. There are no compelling reasons to grant the petition. The Chief Justice's opinion (joined by Justices O'Connor and Kennedy) in *Barnes* concluded that "the [Indiana] statute's purpose of protecting societal order and morality is clear" *Barnes*, 111 S. Ct. at 2461, and that such a purpose furthers a substantial government interest. *Id.* at 2462. Justice Souter concurred as to the State's purpose of protecting societal order, stating that "the interest asserted by [the State of Indiana] in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here." *Barnes*, 111 S. Ct. at 2469. See also *Barnes* at 2468, 2469 wherein Justice Souter explicitly based his concurrence on "the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondent's establishments," i.e., the Glen Theatre and the Kitty Kat Lounge.

As explained in the District Court opinion in the case at bar, the County's Ordinance is a law of general application whose purpose is to suppress the harmful secondary effects caused by public nudity and, as written, complies in all material respects with the holding of the Supreme Court in *Barnes*. Although the Ordinance prohibits public nudity in all Public Places within the unincorporated area of the County including the County's ocean beaches, streets and sidewalks, and all public and private establishments (such as K-Mart) that are open to the public, the Petitioner complains that the Ordinance targets nude dance and unconstitutionally prevents its employees from dancing nude before its customers. That argument is clearly specious and presents no compelling reason for granting the requested writ. Section 6 of the Ordinance prohibits being Nude in Public Places. The Ordinance definitions of Nude and Public Places describe only body parts, opaque covering and public locations. Section 6 makes no mention of "dance" or "expression" or "activity" other than the conduct of being Nude. The activities featured at the Petitioner's Cafe Erotica – live nude female waitresses and live nude female dancers who move about in a rhythmic fashion in time to music (R3-58-1) (*Cafe 207* at 643) – are no different than the conduct performed at the Kitty Kat Lounge and the Glen Theatre as described in *Barnes*. The Supreme Court in *Barnes* rejected the same arguments presented by the Petitioner. There are no compelling reasons to revisit issues that were laid to rest by *Barnes*.

A. There Is No Conflict Between The Decision Of The Court Of Appeals Below And A State Court Of Last Resort.

Petitioner argues that the decision of the District Court (approved by the Court of Appeals) conflicts with *Connor v. Town of Hilton Head Island*, 442 S.E.2d 608 (S.C. 1994). That contention is not true. *Connor* dealt with a

town ordinance that specifically regulated "sexually-oriented businesses" which are defined in the ordinance as nightclubs or bars where nude or semi-nude dancing is performed. The town ordinance also specifically prohibited nude and semi-nude dancing. *Connor* at 609. Although the *Connor* opinion recognized that *Barnes* upheld an Indiana statute making it unlawful to appear nude in a public place, it distinguished the town's ordinance from the Indiana statute because the town ordinance did not prohibit public nudity in general, but "specifically target[ed] the sexual or erotic message of nude dancing." *Connor* at 610.

The District Court opinion in the case at bar contains a verbatim recitation of Ordinance Section 6 which makes it unlawful to appear "nude in a public place or in any other place which is readily visible to the public." *Cafe 207* at 643. Clearly, the County's Ordinance, like the Indiana statute in *Barnes*, is an ordinance of general application that prohibits conduct, i.e., the conduct of being nude in public. The District Court expressly confirmed that fact in *Cafe 207* at 650 when it stated that the "principal objective of the ordinance, [is] namely, the regulation of public nudity whether commercially motivated or not." See also footnote 3 of the District Court's opinion wherein the Court affirmed that the Ordinance is, on its face, a law of general application applicable to all nudity in public places. Additionally, the District Court opinion points out that the Ordinance contains "detailed findings of fact" (see the Court's footnote 2), a section entitled "Intent" (see the Court's footnote 6), and a definition of "public places," *Id.* at 643. The Ordinance findings, the Ordinance Section entitled "Intent," and the Ordinance definition of Public Places make it absolutely clear that Section 6 of the County's Ordinance applies to nudity in all public places and does not just regulate nightclubs, bars, and sexually-oriented businesses as does the town ordinance in *Connor*. There is no conflict between *Connor* and the case at bar.

Petitioner also hypothesizes that the existence of Florida Statute Section 800.03, initially enacted in 1917, somehow compels the conclusion that the County's Ordinance was directed solely at the Petitioner or solely at nude dance. That hypothesis is untenable because Florida courts have consistently held that Section 800.03 applies only to lascivious public nudity. Petitioner has consistently asserted that its nudity is not lascivious. In *Goodmakers v. State*, 450 So.2d 888 (Fla. 2nd DCA 1984) the court construed Section 800.03 and held that it does not apply to a completely naked man sleeping on his back on a dock in public view. See also *South Florida Free Beaches, Inc., v. City of Miami*, 734 F.2d 608 (11th Cir. 1984) recognizing that "the Supreme Court of Florida limited the reach of Florida Statute Section 800.03 in *Hoffman v. Carson*, 250 So.2d 891, 894 (Fla. 1971). The statute does not prohibit all nudity." Unlike South Carolina, the Florida Constitution grants Florida counties the power to govern themselves through home rule. Unless the Florida legislature has preempted a particular subject by general or special law that either specifically authorizes an activity or specifically restricts counties with respect to regulating a subject matter, the County is empowered under its home rule power to regulate the activity or subject matter in order to accomplish its governmental purpose. *Speer v. Olsen*, 367 So.2d 207, 211 (Fla. 1979); *St. Johns County v. Northeast Florida Builders Ass'n*, 583 So.2d 635, 642 (Fla. 1991). The many reported cases, such as *Geaneas v. Willets*, 911 F.2d 579 (11th Cir. 1990) and *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985), that uphold local ordinances regulating public nudity in Florida without regard to lasciviousness make it readily apparent that Section 800.03 does not preempt local ordinances such as the one at bar. In any event, the District Court did not mention Florida Statute Section 800.03 in its opinion. There is no conflict with *Connor*.

B. There Is No Conflict Between The Decision Of The Court Of Appeals Below And The United States Supreme Court Decisions In *Arkansas Writers Project, Inc. v. Ragland, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, Grosjean v. American Press Co.*, and *Turner Broadcasting System, Inc. v. F.C.C.*

Petitioner argues that the decision of the District Court (approved by the Court of Appeals) conflicts with *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and *Turner Broadcasting System, Inc. v. F.C.C.*, ___ U.S. ___, 114 S. Ct. 2445 (1994). That contention is not true.

In *Grosjean* the State of Louisiana enacted a license tax that taxed only businesses engaged in printing or publishing advertisements in movies, newspapers and other publications. In *Arkansas Writers Project, Inc.* the State of Arkansas imposed a sales tax on certain magazines based solely on their content. In *Minneapolis Star & Tribune Co.* the State of Minnesota imposed a special use tax on ink and paper used only by a small group of newspapers. And, in *Turner Broadcasting System* the United States Congress passed an act that required cable television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast programming. Each of these cases dealt with the freedom of press and speech that are the core of the First Amendment. Section 6 of the County's Ordinance, however, merely prohibits the conduct of appearing nude in places open to the public. It does not tax or otherwise affect the printed or spoken word. It is applicable only to adult men and women appearing naked or nearly naked in public places.

The Ordinance defines "public place" as follows:

> Public Place: Any location frequented by the public, or where the public is present or likely to

> be present, or where a person may reasonably be expected to be observed by members of the public. Public Places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets, and meeting facilities utilized by any religious, social, fraternal or similar organization. Premises, or portions thereof such as hotel rooms, used solely as a private residence, whether permanent or temporary in nature shall not be deemed to be a Public Place. (P.A.-C-35).

Unlike the laws at issue in the four Supreme Court cases cited by the Petitioner, the Ordinance is not directed at, nor does it affect, speech or the printed word. There is no conflict between the District Court's opinion and the four cases cited by the Petitioner.

The Petitioner speculates in this portion of its petition about the intent of the Ordinance with respect to what the Petitioner refers to as "high brow" nude performances vis a vis nude waitresses and nude adults who sway rhythmically in public to the sound of music. There is no compelling reason for the Supreme Court to determine or address that intent. The District Court opinion quoted and set forth Ordinance "Whereas" paragraphs (m), (x) and (y) (*Cafe 207* at 649), the Ordinance Section 6 prohibitory provision (*Cafe 207* at 643), and subsection (b) of the Ordinance Section 7 exemption provision (*Cafe 207* at 648). Those paragraphs and provisions, clearly express the intent of the Ordinance to exclude from its application public nudity that can not be prohibited because of First Amendment protection. As the District Court recognized, "[m]erely because it is impractical if not impossible to precisely describe in words all of the types of nude

performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague." *Cafe 207* at 649. Petitioner, in fact, acknowledged in its petition for injunctive and supplemental relief that the Ordinance applied to it and its employees (R1-1-4).

Ordinance "Whereas" paragraphs (o) and (m), the definitions of "Public Place" and "Places Provided Or Set Apart For Nudity", the prohibitory Section 6, the exemption Section 7, the intent Section 2, and"Whereas" paragraph (w) recognizing that "States may regulate the conduct of appearing Nude in Public Places, see *Michael Barnes v. Glen Theatre, Inc.*, 115 L.Ed. 2d 504, 111 S. Ct. 2456 (1991)" clearly describe and implement the Ordinance's intent. That intent is to prohibit the conduct of being Nude (as defined in the Ordinance), on the County's public beaches, streets and sidewalks, and in establishments open to the public such as K-Mart, the post office, and local restaurants. Such prohibited public conduct includes swaying rhythmically in the nude to music, whether such nude swaying is in bars, restaurants or on the public beaches. The Ordinance protects First Amendment expression and is in accord with the holding in *Barnes*. There is no compelling reason in the context of this case for the Court to readdress the issues determined in *Barnes*.

C. The Facts Of This Case And The Opinion Of The Court Of Appeals Present No Compelling Reason To Grant The Petitioner's Request For A Writ Of Certiorari.

Contrary to the assertion contained in the heading of Petitioner's paragraph C, the Ordinance does not totally prohibit nude performances in all contexts. The Ordinance Section 7 exemption allows public nakedness when it constitutes constitutionally protected expressive conduct. In those circumstances, the Ordinance does not

require a person to wear any clothing at all. When, however, public nakedness can be prohibited, as in the circumstances described in *Barnes* and *Dexterhouse*, the Ordinance requires adult men and women to cover one-third of their buttocks and adult women to cover one-quarter of their breasts to include the nipple and areola when they are in public. The County Commission established these fractional coverage requirements with the help of the evidence and testimony presented at the three public hearings and the studies, findings and conclusions contained in the numerous reported court opinions that uphold public nudity ordinances. Ordinance "Whereas" paragraph (u) states the Commission's finding that the coverage requirements are the most reasonable and minimal restrictions necessary to regulate conduct that is adverse to public order within St. Johns County. The County's restrictions are less restrictive than the restrictions contained in most ordinances and statutes throughout the United States which generally require coverage of the entire buttocks and coverage of the female breast below the top of the areola (see for instance *Geaneas*, at 580, n.1, and the perpendicular – horizontal lines definition of buttocks at 586, 587).

In *Barnes*, this Court recognized that nude dancing of the type performed at the Glen Theatre and the Kitty Kat Lounge, as described in *Barnes*, is expressive conduct within the outer perimeters of the First Amendment, though only marginally so. *Barnes*, 111 S. Ct. at 2460. Nevertheless, the *Barnes* opinion held that local governments may enact and enforce laws of general application such as the County's Ordinance that are directed at the conduct of being nude in public, even though such ordinances have the incidental effect of prohibiting nude dance of the type performed at the Glen Theatre and Kitty Kat Lounge.

The United States Supreme Court has made it abundantly clear that ordinances that regulate conduct, and in so doing incidently affect expressive conduct, do not

have to be drafted in a manner that eliminates all less restrictive alternatives. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 478 (1989) and the cases cited therein. The Constitution requires only that the ordinances be "narrowly tailored" and not "burden substantially" more expressive conduct than is necessary to further the government's legitimate interest. *Id.* at 478. There is no "least restrictive means" requirement for such laws. As is clearly stated in *Board of Trustees v. Fox*, the Supreme Court has "not insisted there be no conceivable alternative." *Id.* at 478. Petitioner argues, however, that the following sentence in *Barnes* overturns the clear body of law that the Court took great effort to enunciate in its recent 1989 *Board of Trustees v. Fox* opinion:

> "It is without cavil that the public indecency statute is 'narrowly tailored;' Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose." *Barnes*, 111 S. Ct. at 2463.

That argument is fallacious. The quotations around the words "narrowly tailored" emphasize the *Board of Trustees v. Fox* holding that the Ordinance must be narrowly tailored but need not employ the least restrictive means. The observation following the semicolon merely states the obvious – there are no articles of clothing having less dimension than pasties and a G-string. This observation does not constitute a holding that pasties and a G-string are the *maximum* requirements of dress that an anti-nudity ordinance may impose. (*Cafe 207* at 646.)

Board of Trustees v. Fox also made it clear that courts should be "loath to second-guess the government's judgement" that a restriction on conduct is narrowly tailored and does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Board of Trustees v. Fox* at 478. In the case at bar, the County clearly expressed its judgement on the matter in Ordinance "Whereas" paragraph (n) when, after three

public hearings, the County Commission found and determined that a requirement that dancers don opaque covering sufficient to cover one-third of the buttocks and one-quarter of the breasts does not deprive the dance of whatever erotic message it may convey, but simply makes such message, if any, slightly less graphic and imposes only an incidental limitation on the message. (P.A.-C-27).

The County's care in permitting less body coverage than is commonly required by other local governments and the County's concern, as expressed in its "Whereas" findings and determinations, not to be more restrictive than necessary to achieve its purpose of combating the harmful secondary effects of public nudity are apparent from the Ordinance and the opinion of the District Court. This Court made it clear in *Board of Trustees v. Fox* that its decisions require a fit "between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed." (citations omitted.) *Board of Trustees v. Fox* at 480. Clearly, the Ordinance fits within the constitutional bounds set forth in *Board of Trustees v. Fox*.

Petitioner also contends that the Ordinance is unconstitutionally overbroad in scope. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) makes it clear that the overbreadth doctrine is a narrow exception to the Court's traditional rules of standing. The Court, in *Broadrick*, confirmed that the function of the overbreadth doctrine, "a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid

criminal laws . . . " *Broadrick* at 615. The *Broadrick* opinion continued by stating that "[a]lthough such laws, if too broadly worded, may alter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Id.* at 615. The Court then concluded that the overbreadth doctrine should be used "sparingly and only as a last resort" *Id.* at 615.

The District Court opinion in the case at bar quoted extensively from *Broadrick*, recited Ordinance "Whereas" paragraphs (x) and (y) in full, and then concluded that "in light of the Section 7 exemptions and judging the [O]rdinance as a whole under the principles of *Broadrick* and *Geaneas*," the Ordinance is not unconstitutionally overbroad. *Cafe 207* at 649. The text of the Ordinance fully supports that conclusion.

The facts in this case and the opinion of the District Court as adopted by the Court of Appeals provide no compelling reason to grant the Petitioner's request for a writ of certiorari.

D. There Is No Conflict Between The Decision Of The Court Of Appeals Below And The Sixth Circuit Court Of Appeals Decision In *Triplett Grille, Inc. v. City of Akron* Pertaining To The Doctrine Of Overbreadth.

Petitioner next contends that there is a conflict pertaining to the doctrine of overbreadth between the decision of the District Court (as adopted by the Court of Appeals) in the case at bar and the decision of the Sixth Circuit Court of Appeals in *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994). Once again the Petitioner is mistaken.

The Court's opinion in *Triplett Grille* advises the reader that the Akron public indecency ordinance prohibited all public nudity, including live performances with serious literary, artistic, or political value. *Triplett Grille* at 136. The Court was troubled with that fact and reasoned that although the City of Akron could rely on the recognition contained in *Barnes* and *Renton* of the harmful secondary effects generated by nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre, the City did not have before it evidence that "high culture" nude entertainment caused any adverse secondary effects. As a result, the Court held that because the Akron ordinance contained no limiting provision that would allow "high culture" live public nudity in the absence of evidence of harmful secondary effects, the ordinance was overbroad in its prohibitions. *Id.* at 136. The *Triplett Grille* opinion does not conflict with the District Court's opinion because, unlike the Akron ordinance, the County's Ordinance does not prohibit constitutionally protected "high culture" public nudity. The District Court in the case at bar discussed the overbreadth doctrine at length (*Cafe 207* at 647-649) and quoted the following language from *Broadrick*:

> where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that §818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied. (*Cafe 207* at 647, 648.)

The District Court then concluded that the Ordinance "Whereas" provisions combined with the Section 7 exemptions and the severability clause compel the conclusion that under the principles enunciated in *Broadrick* and *Geaneas* there is no real and substantial overbreadth

in the Ordinance that can not await case-by-case limiting construction. *Cafe 207* at 649.

In *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 494 (1982), the Court enunciated the rule that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." Section 7 of the Ordinance expressly exempts constitutionally protected nudity. Petitioner, thus, has no standing to question hypothetical effects the Ordinance may have on hypothetical factual situations that are not present in the case at bar. *Broadrick; Geaneas*. Since Ordinance Section 7 exempts nude expression that can not be prohibited under the Constitution, there is no need to ponder whether the County Commission considered evidence that such nudity causes harmful secondary effects. The District Court's opinion and the *Triplett Grille* opinion simply do not conflict with each other. There is no compelling reason to grant the Petitioner's request for a writ of certiorari.

E. There Is No Conflict Between The Decision Of The Court Of Appeals Below And The Decisions Of *Connor v. Town Of Hilton Head* And *Pel Asso, Inc. v. Joseph* Pertaining To A Least Restrictive Means Analysis.

The Petitioner's assertion that the *Connor* opinion found the Town of Hilton Head Island's ordinance unconstitutional under a least restrictive alternative requirement based upon the amount of clothing required by the ordinance is difficult to fathom. In the first place, the *Connor* opinion did not use a "least restrictive means" test but instead explicitly recognized the *O'Brien* "incidental restriction" requirement which, as explained in *Board of Trustees v. Fox* and the cases cited therein, does not equate to a least restrictive means test. Secondly, the *Connor*

opinion did not base its decision on a clothing requirement greater than pasties and G-strings (the town ordinance, in actuality, required only pasties and G-strings) but invalidated the ordinance because the ordinance totally banned all forms of nude dance. *Connor* at 610. That is not the case here.

Likewise, *Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993) did not invalidate the City of La Grange ordinance based upon the amount of clothing required by the ordinance but because "[t]he ordinance forbids nude appearances everywhere." *Id.* at 267. The County's Ordinance clearly does not prohibit nudity in Places Provided Or Set Apart For Nudity, as defined in the Ordinance, and it does not prohibit nudity in any public place when such nudity is constitutionally protected. There is no conflict between the District Court opinion in the case at bar and *Pel Asso, Inc.*

The balance of Petitioner's argument in this section of its petition is also without merit. Petitioner states flatly that "the courts in the case at bar did not analyze whether the County's clothing requirement was greater than essential for accomplishment of any legitimate and substantial County interest" (P-24). That issue was addressed at length by the District Court. *Cafe 207* at 645, 646. See also Ordinance "Whereas" paragraph (u) (Page 2 *supra.*).

Petitioner's assertion that the Court should grant review of this case to use it as a vehicle to revisit "pure speech" issues is likewise without merit. See pages 12 through 14 *supra.* Neither the content of the Ordinance nor the opinions of the Courts below provide a compelling reason to grant Petitioner's request for a writ of certiorari.

F. The Ordinance And The Appellate Court Opinion In The Case At Bar Present No Compelling Reason To Revisit The Issue Of Proof Of Secondary Effects In Adopting Anti-Nudity Ordinances.

Petitioner is correct in stating that numerous lower courts have construed Justice Souter's opinion in *Barnes* as being the narrowest opinion supporting the judgment and have applied the "adverse secondary effects" analysis that Justice Souter emphasized in upholding or rejecting adult entertainment ordinances. Petitioner is incorrect, however, when it asserts that Justice Souter was the only member of the Court to base the Court's judgement on adverse secondary effects. As explained in *International Eateries of America, Inc., v. Broward County Florida*, 941 F.2d 1157 (11th Cir. 1991), Chief Justice Rehnquist (joined by Justices O'Connor and Kennedy) concluded in *Barnes* "that the [Indiana] statute's purpose of protecting societal order and morality is clear [citing *Barnes*] and that such purpose furthers a substantial government interest" *Int'l Eateries* at 1160. The *International Eateries* opinion then pointed out that although Justice Souter declined to embrace "morality" as providing a sufficient governmental interest to uphold the statute, Justice Souter concurred with the plurality that societal order, i.e., combating the adverse secondary effects of public nudity, constituted a sufficient government interest to uphold the statute. *Id.* at 1160.

Petitioner is also incorrect when it asserts that the Ordinance targets nude dance. *See* pages 9 and 10 *supra*.

Petitioner uses this section of its petition to request the Court to grant a writ of certiorari to readdress the question of whether proof of "secondary effects" has any relevancy in analyzing an anti-nudity ordinance. That question was clearly answered in *Barnes*: (i) where the plurality opinion of the Court acknowledged that although there was no legislative history for the statute and the statute contained no findings or statements of purpose, "the statute's purpose of protecting societal

order and morality is clear from its text and history" *Barnes* at 2461; (ii) where Justice Souter cited and discussed the findings and conclusions set forth in *Renton v. Playtime Theatres, Inc., Young v. American Mini Theatres, Inc., California v. La Rue, United States v. Maurer,* and *United States v. Doerr* (citations omitted) that recognized the adverse secondary effects of public nudity and adult entertainment and concluded that local governments seeking to combat those adverse secondary effects "need not await localized proof of those effects" and are not "required affirmatively to undertake to litigate this issue repeatedly in every case" *Barnes* at 2470; and (iii) where the plurality opinion cited *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 61 (1973) and affirmed that "a legislature could legitimately act on such a conclusion to protect the social interest in order and morality" *Barnes* at 2462. *See also Barnes* at 2466, 2468, and 2469. The lower Courts have had no difficulty in understanding the conclusions in *Barnes* and *Renton* that local legislatures may rely upon the experiences of other communities and upon the findings, conclusions and holdings of these and other cases and conclude, without more, that public nudity of the type prohibited by the County's Ordinance generates harmful secondary effects. *See International Eateries,* 941 F.2d at 1162, 1163; *Triplett Grille* at 135; pages 19 and 20 *supra*; and *Cafe 207* at 645. There are no compelling reasons to readdress that issue.

G. There Is No Compelling Reason For The Court To Test The Ordinance For Vagueness; Petitioner Has No Standing To Argue Vagueness; There is No Conflict Between The Opinion Of The Court Of Appeals Below And *Gentile v. State Bar of Nevada.*

Petitioner has no standing to assert that the Ordinance is unconstitutionally vague. Petitioner conceded in its petition for injunctive and supplemental relief that the Ordinance applies to it (R1-1-4) and in its pretrial statement that "[i]n response to the Ordinance, the dancers

now wear clothing which complies with the minimum requirements of the Ordinance" (R3-58-14). Petitioner has thus conceded that the Ordinance applies to the nude conduct that Petitioner and its dancers engage in and that they know what minimum clothing is required in order to comply with the Ordinance definitions and prohibitions. Petitioner therefore lacks standing to challenge the Ordinance's language for vagueness. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821, 833 (4th Cir. 1976), *cert. denied*, 447 U.S. 929 (1980).

Petitioner nevertheless contends that the District Court's opinion in the case at bar upholding the constitutionality of Sections 6 and 7 of the Ordinance conflicts with this Court's opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). That contention is like trying to make apples conflict with oranges. The District Court's opinion dealt with the conduct of being nude in public, which in the best of circumstances favorable to the Petitioner's vagueness argument, is only marginally within the outer perimeter of the First Amendment. *Barnes* at 2460. The *Gentile* opinion dealt with pure political speech, the very core of the First Amendment. In fact Justice Kennedy's opinion in *Gentile* emphasized that "one central point must dominate the analysis – this [the *Gentile*] case involves classic political speech." *Id.* at 1034. Additionally, the *Gentile* opinion expressly recognized that the *Gentile* case was unlike the case in *Barnes*. *Id.* at 1034. There is no conflict between *Cafe 207* and *Gentile*.

Broadrick makes it clear that First Amendment protections diminish substantially and disappear completely as the subject matter of the regulation moves from pure speech to pure conduct. Similarly, *Barnes* at 2466 confirms that it "cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First-Amendment scrutiny . . . " As stated in the District Court's

opinion, Ordinance Section 6 prohibiting the conduct of being nude in public places regulates pure conduct. The County, however, recognized in paragraph (m) of its findings that there may be instances wherein appearing nude in a public place may be expressive conduct incidental to and a necessary part of the freedom of expression that is protected by the United States Constitution. Therefore, the County provided exemptions in Section 7 of the Ordinance. Section 7(a) permits nudity in single sex locker rooms, doctor's offices and other such places where nudity is expected and causes little, if any, harmful secondary effects. Section 7(b)(i) describes and permits certain expressive nude conduct but makes it clear by its reference to *Dexterhouse* that the expressive nude conduct described in Section 7(b)(i) does not include nude "topless" and "bottomless" dancing employed as sales promotion in bars and restaurants. *See also* the reference to *Barnes* in Ordinance "Whereas" paragraph (w). Section 7(b)(ii) of the Ordinance then specifically and unequivocally provides that the conduct of being Nude is not prohibited when such conduct is protected by the United States or Florida Constitution.

The Petitioner nevertheless complains that the provision is vague because it refers only to the Constitution and does not list every conceivable combination of facts and circumstances under which nude conduct in public places is prohibited – or in the alternative – is constitutionally protected. There is no requirement that such list be provided. As explained in *Lewis Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 110 (1972), "[t]he root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said '[w]e believe that citizens who desire to obey the statute will

have no difficulty in understanding it . . . ' " The Petitioner understands the Ordinance (R1-1-4; R3-58-14) and the District Court in the case at bar, after discussing the vagueness issue raised by the Petitioner, concluded "that the Ordinance is not unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment" *Cafe 207* at 650. The use of the word "Constitution" in Section 7(b)(ii) is simply not fatally vague when read in conjunction with the entire Ordinance. The Florida Supreme Court addressed a similar situation in *State v. Egan*, 287 So.2d 1, 6 (Fla. 1973) when it held that a statute declaring the "common law" of England pertaining to crimes to be in force in Florida was not void for vagueness. In that opinion the Florida Supreme Court stated that "[a]lthough the opinions of this court are not always the essence of clarity, and never as lucid as we would have them, in this instance those previously rendered on this subject clearly advise all people . . . [what] the . . . crime . . . includes. . . . These decisions are certainly more readily available and more easily understood than the common law." In like manner, case law provides guidance as to when nude conduct is protected by the First Amendment. *Barnes* made it clear that nude dancing of the type performed by Petitioner – swaying rhythmically in the nude to music as a sales promotion – is not protected by the First Amendment. Each community may thus decide for itself whether to allow or prohibit such nudity – much the same as regulated prostitution is allowed in Nevada but not elsewhere. There is no compelling reason for the Court to revisit the nude conduct at issue in the case at bar. A different case that actually involves artistic expressive nudity can provide an appropriate vehicle for the Court to expand or define the contextual elements necessary for constitutionally protected public nudity. There is no compelling reason to issue a writ of certiorari under the facts of this case.

H. In The Event The Court Grants The Petition For Writ Of Certiorari And Eventually Rules The Ordinance Unconstitutional, The Decision Should Be Limited To A Prospective Application.

Although the County is confident that the Ordinance is constitutional, in an abundance of caution, the County requests that in the event the Court grants the petition for writ of certiorari and later determines that any part of the Ordinance is unconstitutional, the Court specifically declare that the Court's decision is limited only to prospective application. This case complies with the three factors for prospective application described in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

Petitioner has, in effect, conceded that it complies with the first factor, an issue of first impression or announcement of a new principle of law. See the Declaration of John H. Weston attached to Petitioner's Motion For Extension Of Argument Time filed with the Appellate Court below.

The First Amendment is intended primarily to protect political speech. As recognized in *Barnes*, expressive communication through the act of nudity is only marginally within the outer perimeter of the First Amendment. *Barnes* at 2460. Application of the "old" case law on governmental regulation of public nudity as set forth in *Barnes* and *Board of Trustees v. Fox* will not contravene the core purpose of the First Amendment's protection of political speech. Hence, the second factor of the *Chevron Oil* analysis is satisfied.

And finally, the retroactive application of a new rule limiting governmental regulation of public nudity would produce the third factor of substantial inequitable results. A new rule would expose the County and other local governments to future litigation asserting governmental liability for past regulation of public nudity under ordinances that were previously enacted in reliance upon existing case law.

Based on the three factors of the *Chevron Oil* analysis, the County respectfully submits that a decision by this Court determining that the Ordinance, or any part thereof, is unconstitutional should be confined to a prospective application.

I. The Appeal Has Become Moot Because Petitioner Conveyed The Restaurant (Cafe Erotica) To Another Corporation. The Court No Longer Has Jurisdiction.

At the time the Petitioner (Cafe 207, Inc.) instituted this lawsuit, it was the owner of the restaurant, Cafe Erotica. By virtue of its ownership of the restaurant, the Petitioner could allege the requisite "injury in fact" to give it standing to challenge the Ordinance. However, on or before March 1, 1996, the operation and ownership of the restaurant was conveyed to Cafe Erotica of Florida, Inc. as evidenced by an Application For License filed with the Department of Business and Professional Regulation of the State of Florida and by two occupational licenses recently issued for the new owner operator. Certified copies of the application for license, the Department's receipt, and the two recently issued County occupational licenses are set forth in the Appendix attached hereto. Petitioner is not owned by, nor does it own, Cafe Erotica of Florida, Inc. *See* page v of the petition for writ of certiorari.

Mootness is a jurisdictional question because the Court does not have the power under the Constitution to decide moot questions. *North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed 2d 413, 416 (1971). Under Article III of the Constitution, the exercise of judicial power depends on the existence of a case or controversy. An actual controversy must exist at the stage of appellate or certiorari review, as well as at the date the action was commenced. *DeFunis v. Odegaard*, 416 U.S. 312, 40 L.Ed 2d 164, 170 (1974).

Since the Petitioner has conveyed the Cafe Erotica to another corporation, there is no present or threatened

injury to Petitioner that justifies the continuation of jurisdiction. An essential element for a "controversy" under Article III is now missing. As stated by this Court in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 48 L.Ed. 2d 450, 461 (1976):

> "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies."

The original petition filed in the District Court seeking only declaratory relief and an injunction is now moot. The petition did not seek relief under 42 U.S.C. §1983. Further, the petition did not seek, and the Petitioner did not attempt to prove, monetary damages. Petitioner, in fact, affirmed at page 30 of its reply brief submitted to the Appellate Court below that its petition sought "injunctive relief, not damages." An injunction will no longer give any benefit to the Petitioner. Furthermore, declaratory relief is now reduced to reviewing an abstract question of law. Where a substantial controversy does not exist, a request for declaratory relief is moot. *Preiser v. Newkirk*, 422 U.S. 395, 45 L.Ed. 2d 272, 278 (1975). Mootness arises because a federal court does not have "the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Id.* at 277.

In the case *sub judice* there is no longer any good faith arguable First Amendment, "injury in fact." Having conveyed the restaurant, the Petitioner can no longer allege a "distinct and palpable injury" to itself. *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed. 2d 343, 356 (1975). The establishment of an injury in fact is the "irreducible minimum" required to bring a cause of action in federal court. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 98 L.Ed. 2d 782, 793 (1988). This requirement applies in all cases,

including cases presenting First Amendment Claims. *Id.* at 793.

This case has become moot by the conveyance of the restaurant to another corporation. In the absence of a substantial current controversy as required by Article III of the Constitution, the petition for writ of certiorari should be dismissed.

CONCLUSION

In 1992, the Petitioner owned a restaurant named Cafe Erotica that featured nude female waitresses and nude female dancers who moved about in a rhythmic fashion in time to music. (R3-58-1). *Barnes* held that the Constitution does not prevent local governments from prohibiting such public nudity. The Ordinance complies in all material respects with the holding in *Barnes* and with the case law in *Board of Trustees v. Fox*. Petitioner no longer owns or operates the restaurant. There are no compelling reasons to grant the requested petition for writ of certiorari. The Petition should be denied.

Respectfully submitted,

James G. Sisco
4020 Lewis Speedway
(P.O. Box 1533)
St. Augustine, Florida 32095
(904) 823-2457
Attorney for Respondent

APPENDIX

FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

March 4, 1996

I certify the attached copies of Florida Department of Business and Professional Regulation records, "Application for License" (Form BPR 21-020) and "Receipt for License" (Form BPR 21-024), both submitted for Cafe Erotica of Florida, Inc., are true and correct copies of original public records of which I am the official custodian, with the exclusion of U.S. Social Security numbers, which have been deleted from these copies.

/s/ Shirley C. Blaylock
Shirley C. Blaylock
Sanitation and Safety Supervisor
DIVISION OF HOTELS AND RESTAURANTS
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

State of Florida
County of Duval
THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 4TH DAY OF MARCH, 1996 by *SHIRLEY BLAYLOCK* WHO IS **PERSONALLY KNOWN TO ME** OR WHO HAS PRODUCED ___ AS IDENTIFICATION.

/s/ Quida M. Thompson, Notary Public
Quida M. Thompson (SEAL)
My Commission # CC433898 Expires January 17, 1999
Bonded Thru Troy Fain Insurance, Inc.

Division of Hotels and Restaurants
1127 Arlington Road • Jacksonville, Florida 32211-5812
Telephone (904) 727-5540 • Toll Free (800) 226-5561
• Fax (904) 727-5558

Division Of Hotels and Restaurants

APPLICATION FOR LICENSE

BPR CONTROL NUMBER: 65 00523 R

Type of Application
[ ] New Establishment
[x] Change of Ownership
[ ] Reinstatement

1. Opening Date: 03/01/96
2. Sales Tax #:
3. Check one – [ ] Sole Proprietor
   [ ] Partnership
   [x] Corporation
   [ ] Other
4. Owner Name: CAFE EROTICA OF FLA INC
5. President Name: JEAN-CLAUDE BRUNEL
6. Establishment Name: CAFE EROTICA
7. Establishment Address: 2620 ST RD 207
   ELKTON FLA
8. Establishment City: ST AUGUSTINE
9. Zip Code:
10. County: ST. JOHNS
11. Telephone: Business (904) 829-2599
    Home (904) 758-8993
12. Check One And Provide Information As Applicable
    Food Service
    [x] (Z) Seating – # of Seats 54
    [ ] (Z) Theme Park Food Cart – # of Carts ___
    [ ] (G) Vending
    [ ] (G) No Seats
    [ ] (O) Mobile Food Dispensing Vehicle

[ ] (O) Satellite Service – # of Units ___
[ ] (P) Temporary Lodging
[ ] (1) Non-Transient Apartment
[ ] (2) Hotel
[ ] (3) Motel
[ ] (5) Transient Rooming House
[ ] (6) Individual Condominium
[ ] (6) Individual Resort Dwelling
[ ] (7) Transient Apartment
[ ] (8) Group Condominium
[ ] (8) Group Resort Dwelling
[ ] (9) Collective Condominium
[ ] (9) Collective Resort Dwelling
[ ] (10) Non-Transient Rooming House

13. Alcoholic Beverage License [ ] Yes [x] No
14. Social Security Number:
15. Federal Employer's Identification Number: 59-3359014

Indicate Mailing Address Below If Different From Establishment Location Address

16. Mailing Name: CAFE EROTICA OF FLA INC
17. Mailing Address: PO BOX 1069
18. Mailing City: MICANOPY FLA
19. State: FLA Zip Code: 32667-1069

19. FOR ESTABLISHMENTS OWNED OR OPERATED BY PARTNERSHIPS, CORPORATIONS OR COOPERATIVES, please attach a separate sheet or sheets listing the name, address, and social security number of each person who owns 10% or more of the outstanding stocks or equity interest in the licensed activity and the name, address, and social security numbers of each officer, director, chief executive, or other person who, in accordance with the rules of the issuing agency, is determined to be able directly or indirectly to control the operation of the business of the licensed entity.

20. Has any person interested in the operation of this establishment, whether owner, operator, agent, lessee or manager, been adjudicated guilty, or forfeited a bond when charged with soliciting for prostitution, letting premises for prostitution, keeping a disorderly place, illegally dealing in narcotics, gambling, or other crime reflecting on professional character within the last five (5) years in this state, or any other jurisdiction of the United States? [ ] Yes [x] No
21. Has any person interested in the operation of this establishment, whether owner, operator, agent, lessee or manager, had a license for an Adult Congregate Living Facility at this establishment denied, suspended or revoked pursuant to s. 400.414, F.S., within the last five (5) years? [ ] Yes [x] No
22. FOR CHANGE OF OWNERSHIP OR REINSTATEMENT APPLICATIONS, has the establishment been remodeled since the previous license? [ ] Yes [x] No [ ] N/A

ALL NEW ESTABLISHMENTS MUST PASS AN OPENING INSPECTION PRIOR TO LICENSURE. FOR CHANGES OF OWNERSHIP AND REINSTATEMENTS, IF THE ANSWER TO EITHER OF THE ABOVE QUESTIONS WAS NO, AN OPENING INSPECTION IS NOT REQUIRED; HOWEVER, THE ESTABLISHMENT SHALL BE CHECKED AT THE NEXT ROUTINE INSPECTION FOR COMPLIANCE WITH STATE LAWS AND RULES. ANY DISCREPANCIES FOUND FROM THIS APPLICATION MAY SUBJECT THE LICENSEE TO ADMINISTRATIVE FINES, SUSPENSION OR REVOCATION OF THE LICENSE.

23. THIS APPLICATION MUST BE SIGNED UNDER OATH OR AFFIRMATION BY THE APPLICANT OR OWNER OR CHIEF EXECUTIVE OF THE ESTABLISHMENT, WITHOUT THE NEED FOR WITNESSES. IF A CORPORATION IS IN THE HANDS

OF A RECEIVER OR TRUSTEE, THIS APPLICATION SHALL BE EXECUTED ON BEHALF OF THE CORPORATION BY THE HANDS OF A RECEIVER OR TRUSTEE.

I certify that I am empowered to execute this application as required by Section 559.79, F.S. I understand that my signature on this application has the same legal effect as if made under oath. To the best of my knowledge, all information contained on this application is true and correct. I understand that falsification of any information on this application may result in administrative action, including fines up to $1,000, suspension or revocation of the licensed activity.

/s/ Jean-Claude Brunel By [Signature not decipherable] Representative

Applicant Name and Title (please print or type)

/s/ Jean-Claude Brunel — 2/20/96

Applicant Signature — Date

E12296

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
Division of Hotels and Restaurants
Northwood Centre, 1940 North Monroe Street
Tallahassee, Florida 32399-1015
RECEIPT FOR LICENSE

1. License Control Number

County	File Number	Suffix
65	00523	H [ ] R [x]
		T [ ] C [ ]

2. Transaction Type
   [ ] 1 – New
   [x] 2 – Item Change
   [ ] 6 – Back
   [ ] 7 – Temporary
   [ ] 9 – Re-Application

3. Receipt Reasons
   [ ] A – Full Year
   [x] B – Half Year
   [x] C – Owner Change
   [ ] D – Renewal
   Approvals: D.O. /s/____ S.S.A. ___

4. License Fee Collected SAMAS 2020: $113.50
5. Administrative Fee Collected*: $ 50.00
   Total Fee Collected: $163.50
   Mode of Payment: CK# 1062

* Indicate the Appropriate SAMAS Code for Administrative Fee Collected:
   [ ] New Account – 1016
   [x] Owner Change – 1017
   [ ] Re-Application – 1015
   [ ] Late Fee – 1082
   [ ] Other – ___

6. Receipt date: 2/20/96
7. Open Date: 3/1/96
8. Sales Tax Number: NA
9. Owner Name: CAFE EROTICA OF FLA INC
10. President Name: BRUNEL JEAN-CLAUDE

11. Business Name: ~~CAFE EROTICA~~
12. Building Number
13. Business City:
14. Business Zip Code:
15. Business Telephone:
16. Food Service: [ ] Z – Seating [ ] O – Mobile Food
[ ] G – No Seating [ ] P – Temporary
17. Units/Capacity:
18. Classification:

[ ] 1 – Apartment
[ ] 2 – Hotel
[ ] 3 – Motel
[ ] 4 – Food
[ ] 5 – Trans. Rooming House
[ ] 6 – Indiv. Condo/Resort
[ ] 7 – Trans. Apartments
[ ] 8 – Group Condo/Resort
[ ] 9 – Collect. Condo/Resort
[ ] 10 – Non-Transient Rooming House

19. Alcoholic Beverage License:
[ ] Yes
[ ] No
20. Provide Information As Applicable
[ ] Mobile Food Dispensing Vehicle
[ ] Theme Park Food Cart
[ ] Satellite Service Unit
[ ] Vending Machine

PROVIDE MAILING INFORMATION IF DIFFERENT FROM BUSINESS ADDRESS:

21. Name: CAFE EROTICA OF FLA INC
22. Address: P O BOX 1069
23. City: MICANOPY
24. State: FL Zip Code: 32667-1069
25. Federal Employer's Identification Number: 59-3359014
26. Area Number:
27. Food Service Identification:

[ ] 1 – Associated with Lodging
[ ] 2 – Free-Standing
[ ] 4 – Fast Food

28. Restaurant Classification:

[ ] (A) Catering	[ ] (F) Italian	[ ] (K) American
[ ] (B) Commissary	[ ] (G) Mexican	[ ] (L) Cafeteria
[ ] (C) Theme Park	[ ] (H) Hispanic	[ ] (M) Theater
[ ] (D) Vending	[ ] (I) Greek	[ ] (N) Other
[ ] (E) Oriental	[ ] (J) Seafood	[ ] (O) French

29. Associated Control Number:

30. Required for Classes 2, 3, 5, 6, 7, 8, and 9

Social Security Number _____

Inspector's Signature: /s/ Barbara Bosanko

Applicant/Representatives Signature & Title:
/s/ (signature not decipherable)
[Note: same signature as on Application For License]

FORMER OWNER'S NAME & BUSINESS ADDRESS (if changing) Required for trans. types 2, 6, & 9:
Cafe 207 DBA Cafe Erotica
2620 SR 207

Approved Commissary Name:
Approved Commissary Address:

BPR 21-024 (Formerly DBR 22-006) Revised 10-93

(904) 823-2250
Sun-Com 865-2280
Fax (904) 823-2283
Post Office Box 9001
32085-9001

DENNIS W. HOLLINGSWORTH
Tax Collector
Historical St. Johns County
St. Augustine, Florida

I hereby certify that the attached copies of the St. Johns County Occupational Licenses and St. Johns County Occupational License renewal notices which pertain to Cafe Erotica of Florida, Inc., are true and correct copies of original public records of which this office is the official custodian.

/s/ Dennis W. Hollingsworth
Dennis W. Hollingsworth,
St. Johns County Tax Collector

State of Florida
County of St. Johns

The foregoing instrument was acknowledged before me the 14th day of March, 1996 by Dennis W. Hollingsworth who is personally known to me.

/s/ Cheryl Kent
Cheryl Kent, Notary Public (SEAL)

Dennis W. Hollingsworth
St. Johns County Tax Collector
St. Augustine, FL 32085

This License Is Issued Pursuant
To County Ordinance 72-2

This Certifies
CAFE EROTICA OF FLA. INC
To Do Business As
CAFE EROTICA

Located at: 2620 St. Rd. 207
Elkton, FL

291 RESTAURANT 31-74 SEATS

CAFE EROTICA
P.O. BOX 1069
MICANOPY, FL 32667

NOTICE FOR APPLICANT

ST. JOHNS COUNTY OCCUPATIONAL LICENSE
RENEWAL NOTICE Account No 22834-0
Begins 03/13/96 Expires 09/30/96

An occupational license does not constitute a franchise, an agreement, or permission or authority to perform the services or operate the business described hereon when a franchise agreement or other county commission, state or federal permission or authority is required by county, state or federal law.

NOTICE		LATE PENALTY FEES	
October	10%	Amount	$ 37.50
November	15%	Penalty	$ _____
December	20%		
January	25%	Total	$ 37.50

INSTRUCTIONS: Complete the Reverse Side. Date and Sign Below and Return this Application with Your Remittance.

Application is hereby made for an Occupational License for the privilege of engaging in the business profession or occupation herein described and I solemnly declare under penalty of perjury that the foregoing information relating to number of devices or

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number of accommodations is to the best of my knowledge and belief true and correct.

Sign Here ➞

Signature /s/ Illegible Date 03/13/96

ST. JOHNS COUNTY OCCUPATIONAL LICENSE

06708

This License is issued pursuant
to County Ordinance 72-2

Account No. 22834-0
Begins 03/13/96 Expires 09/30/96

This Certifies CAFE EROTICA OF FLA, INC.
To Do
Business As CAFE EROTICA
Located At 2620 ST. RD. 207 ELKTON, FL

291 RESTAURANT 31-74 SEATS

CAFE EROTICA
P.O. BOX 1069
MICANOPY, FL 32667

This form becomes a receipt only when validated by receipting machine showing a transaction number, date and amount paid.

AMOUNT	$ 37.50
PENALTY	$
TOTAL	$ 37.50

03-13-96 951971
22834-0 $37.50
PAID

Payment received as certified:
DENNIS W. HOLLINGSWORTH
ST. JOHNS COUNTY TAX COLLECTOR, ST. AUGUSTINE, FLORIDA 32085.

This occupational license does not constitute a franchise, an agreement, or permission or authority to perform the services or operate the business described hereon when a franchise, agreement, or other county commission, state or federal permission or authority is required by county, state or federal law.

Dennis W. Hollingsworth
St. Johns County Tax Collector
St. Augustine, FL 32085

This License Is Issued Pursuant
To County Ordinance 72-2

This Certifies
CAFE EROTICA OF FLA. INC
To Do Business As
CAFE EROTICA

Located at: 2620 St. Rd. 207
Elkton, FL

764 SHOWS

CAFE EROTICA
P.O. BOX 1069
MICANOPY, FL 32667

NOTICE FOR APPLICANT

ST. JOHNS COUNTY OCCUPATIONAL LICENSE
RENEWAL NOTICE Account No 22835-0
Begins 03/13/96 Expires 09/30/96

An occupational license does not constitute a franchise, an agreement, or permission or authority to perform the services or operate the business described hereon when a franchise agreement or other county commission, state or federal permission or authority is required by county, state or federal law.

NOTICE		LATE PENALTY FEES	
October	10%	Amount	$ 225.00
November	15%	Penalty	$ _____
December	20%		
January	25%	Total	$ 225.00

INSTRUCTIONS: Complete the Reverse Side. Date and Sign Below and Return this Application with Your Remittance.

Application is hereby made for an Occupational License for the privilege of engaging in the business profession or occupation herein described and I solemnly declare under penalty of perjury that the foregoing information relating to number of devices or

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number of accommodations is to the best of my knowledge and belief true and correct.

Sign Here ➜ Signature /s/ Illegible Date 03/13/96

ST. JOHNS COUNTY OCCUPATIONAL LICENSE

06709
This License is issued pursuant
to County Ordinance 72-2

Account No. 22835-0
Begins 03/13/96 Expires 09/30/96

This Certifies CAFE EROTICA OF FLA, INC
To Do
Business As CAFE EROTICA
Located At 2620 ST. RD. 207
ELKTON, FL
764 SHOWS

CAFE EROTICA
P.O. BOX 1069
MICANOPY, FL 32667

This form becomes a receipt only when validated by receipting machine showing a transaction number, date and amount paid.

AMOUNT	$ 225.00
PENALTY	$
TOTAL	$ 225.00

03-13-96 951972
22835-0 $225.00
PAID

Payment received as certified:
DENNIS W. HOLLINGSWORTH
ST. JOHNS COUNTY TAX COLLECTOR, ST. AUGUSTINE, FLORIDA 32085.

This occupational license does not constitute a franchise, an agreement, or permission or authority to perform the services or operate the business described hereon when a franchise, agreement, or other county commission, state or federal permission or authority is required by county, state or federal law.